Supreme Court, U.S.
FILED
AUG 2 8 2015
OFFICE OF THE CLERK

No. 14-1095

In The
Supreme Court of the United States

MICHAEL MUSACCHIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR PETITIONER

JOE KENDALL
JODY RUDMAN
THE KENDALL LAW GROUP
3232 McKinney Avenue
Dallas, TX 75204
(214) 744-3000
jkendall@kendalllawgroup.com

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, NW
Washington, D.C. 20008
(202) 237-8165
jaffe@esjpc.com

QUESTIONS PRESENTED

1. Whether the law-of-the-case doctrine requires the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions where those instructions, without objection, require the government to prove additional or more stringent elements than do the statute and indictment?

2. Whether a statute-of-limitations bar not raised at or before trial is reviewable on appeal?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Michael Musacchio was the defendant in the district court and the appellant in the Fifth Circuit.

Roy Brown and Michael Kelly were co-defendants in the district court under the original Indictment. They pled guilty prior to trial and were not parties to the appeal in the Fifth Circuit.

Respondent the United States of America prosecuted the case in the district court and was the appellee in the Fifth Circuit.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings Below ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Statement 4

Summary of Argument 14

Argument 19

I. The Elements of a Crime as Instructed in the Jury Charge, without Government Objection, Are the Binding Law of the Case for which there Must Be Sufficient Evidence. 19

A. The Law-of-the-Case Doctrine and the Conflict Over Whether It Is Subject to a Plain-Error Exception 20

B. The "Plainness" of Error in a Jury-Instruction Does Not Support a Law-of-the-Case Exception. 24

C. The Rationale for Reviewing the Sufficiency of the Evidence Does Not Support a Law-of-the-Case Exception. 32

D. The Law-of-the-Case Doctrine Plays a Valuable Role in Checking the Government and Serving the Interests of Lenity and Liberty. 36

II. A Statute-of-Limitations Bar Not Raised at or Before Trial Is Reviewable on Appeal..... 37

A. The Federal Statute of Limitations Is a Substantive and Jurisdictional Constraint on Government Action. 39

B. Failure to Raise a Limitations Bar Is Not a Knowing and Voluntary Waiver. 48

C. At a Minimum, Plain Error Review Is Available for Forfeited Statute of Limitations Bars. 53

D. Structural and Judicial Policy Considerations Favor Allowing Direct Appellate Review of Forfeited Statute of Limitations Bars. 55

Conclusion..... 58

TABLE OF AUTHORITIES

Cases

Acevedo-Ramos v. United States, 961 F.2d 305 (1st Cir. 1992) 44

Agostini v. Felton, 521 U.S. 203 (1997) 25, 26

Arizona v. California, 460 U.S. 605 (1983) 25, 26, 31

Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003) 42, 46

Benes v. United States, 276 F.2d 99 (6th Cir. 1960) 39, 40, 43, 50

Biddinger v. Commissioner of Police, 245 U.S. 128 (1917) 44

Bowles v. Russell, 551 U.S. 205 (2007) 41

Boykin v. *Alabama*, 395 U.S. 238 (1969) 52

Day v.*McDonough*, 547 U.S. 198 (2006) 49

Florida v. *Nixon*, 543 U.S. 175 (2004) 53

Gonzalez v. United States, 553 U.S. 242 (2008) 52, 53, 57

Henderson v. Shinseki, 562 U.S. 428 (2011) 41, 42, 43

In re Winship, 397 U.S. 358 (1970) 32

Jackson v. *Virginia*, 443 U.S. 307 (1979) 32, 34, 35

LVRC Holdings LLC v. Brekka, 581 F.3d 1127 (9th Cir. 2009) 6

Nguyen v. *United States*, 539 U.S. 69 (2003) 47, 48

Pepper v. United States, 562 U.S. 476 (2011) 25, 26

See Evans v. Michigan, -- U.S. --, 133 S. Ct. 1069 (2013) 25, 33

Smith v. United States, 360 U.S. 1 (1959) 31, 51

Taylor v. *Illinois*, 484 U.S. 400 (1988) 52

Toussie v. United States, 397 U.S. 112 (1970) 39, 43, 51

United States v. Aburahmah, 34 F.3d 1074 (9th Cir. 1994) (unpubl.) 57

United States v. Acevedo, 229 F.3d 350 (2d Cir. 2000) 57

United States v. Angiulo, 897 F.2d 1169 (1st Cir. 1990) 21

United States v. Arky, 938 F.2d 579 (5th Cir. 1991), *cert. denied*, 503 U.S. 908 (1992) 13, 38, 40, 44

United States v. Ausler, 395 F.3d 918 (8th Cir.), *cert. denied*, 546 U.S. 861 (2005) 19, 20

United States v. Baldwin, 414 F.3d 791 (7th Cir. 2005), *overruled on other grounds by United States v. Parker*, 508 F.3d 434 (7th Cir. 2007) 39

United States v. *Cook*, 84 U.S. (17 Wall.) 168 (1872) 44, 46

United States v. Coutentos, 651 F.3d 809 (8th Cir. 2011) 56

United States v. Crossley, 224 F.3d 847 (6th Cir. 2000) 38, 40

United States v. Del Percio, 657 F. Supp. 849 (W.D. Mich. 1987), *rev'd*, 870 F.2d 1090 (6th Cir. 1989) 45, 55

United States v. Diehl, 775 F.3d 714 (5th Cir. 2015) 57

United States v. Franco-Santiago, 681 F.3d 1 (1st Cir. 2012) 38, 39, 54

United States v. Gallup, 812 F.2d 1271 (10th Cir. 1987) 40

United States v. Guevara, 408 F.3d 252 (5th Cir. 2005), *cert. denied*, 546 U.S. 1115 (2006) 13, 20, 23

United States v. Harris, 133 F. Supp. 796 (W.D. Mo. 1955) 46

United States v. Inman, 558 F.3d 742 (8th Cir.), *cert. denied*, 558 U.S. 916 (2009) 23, 24, 32

United States v. Jimenez Recio, 537 U.S. 270 (2003) 32, 36

United States v. John, 597 F.3d 263 (5th Cir. 2010) 11, 14

United States v. Johnson, 652 F.3d 918 (8th Cir. 2011) 23

United States v. Jokel, 969 F.2d 132 (5th Cir. 1992) 19, 20

United States v. Nosal, 676 F.3d 854 (9th Cir. 2012) (*en banc*) 11

United States v. Olano, 507 U.S. 725 (1993) ..... passim

United States v. Pigrum, 922 F.2d 249 (5th Cir. 1991) 34

United States v. Santos, 553 U.S. 507 (2008) 31, 43, 47, 51

United States v. Staples, 435 F.3d 860 (8th Cir.), *cert. denied*, 549 U.S. 862 (2006) 21

United States v. Taylor, 933 F.2d 307 (5th Cir. 1991) 21

United States v. *Wells*, 519 U.S. 482 (1997) 19

United States v. Wells, 63 F.3d 745 (8th Cir. 1995), *rev'd*, 519 U.S. 482 (1997) 20

United States v. Williams, 376 F.3d 1048 (10th Cir. 2004) 21

United States v. Zanghi, 189 F.3d 71 (1st Cir. 1999), *cert. denied*, 528 U.S. 1097 (2000) 21, 23

Waters v. United States, 328 F.2d 739 (10th Cir. 1964) 40

Wood v. Milyard, -- U.S. --, 132 S. Ct. 1826 (2012) 49, 50, 51

Statutes

18 U.S.C. § 371 3

18 U.S.C. § 1030 ..... 2, 6, 9

18 U.S.C. § 3282(a) ..... passim

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101 42

28 U.S.C. § 2107(a) 42

28 U.S.C. § 2244(d)(1) 50

28 U.S.C. § 3231 2

Other Authorities

FED. R. CRIM. P. 12, Notes of Advisory Comm., *Note to Subdivision (b)(1) and (2)*.....51

Rules

FED. R. CRIM. P. 12(a) 45
FED. R. CRIM. P. 12(b) 50
FED. R. CRIM. P. 52(a) 28
FED. R. CRIM. P. 52(b) 39, 54
HABEAS CORPUS R. 5(b)..... 50

In The
Supreme Court of the United States

NO. 14-1095

MICHAEL MUSACCHIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The judgment of conviction and sentence of the District Court for the Northern District of Texas can be found at Petition Appendix B1-B12. The transcript of the court's oral denial of a motion for a new trial can be found at Petition Appendix D1-D2.

The opinion of the Fifth Circuit affirming the district court's judgment is unpublished but available at 590 Fed. Appx. 359, 2014 U.S. App. LEXIS 21358, and can be found at Petition Appendix A1-A16.

JURISDICTION

The Fifth Circuit issued its opinion on November 10, 2014. The Fifth Circuit denied rehearing and rehearing *en banc* on December 9, 2014. Pet. App. C1-C2. The petition for a writ of certiorari was filed on March 9, 2015, and granted on June 29, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 18 U.S.C. § 3231.

STATUTES INVOLVED

18 U.S.C. § 1030, entitled "Fraud and Related Activity in connection with computers," provides, in relevant part:

> (a) Whoever— * * *
>
> (2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains— * * *
>
> (C) information from any protected computer; * * *
>
> shall be punished as provided in subsection (c) of this section.
>
> * * *
>
> (c) The punishment for an offense under subsection (a) or (b) of this section is— * * *
>
> (2) (A) except as provided in subparagraph (B), a fine under this title or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2), (a)(3), or (a)(6) of this section which does not occur after a conviction for another offense under this section, or an attempt to

commit an offense punishable under this subparagraph;

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(2), or an attempt to commit an offense punishable under this subparagraph, if--

(i) the offense was committed for purposes of commercial advantage or private financial gain;

(ii) the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State; or

(iii) the value of the information obtained exceeds $ 5,000; and

(C) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(2), (a)(3) or (a)(6) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; * * *

18 U.S.C. § 371, the general conspiracy statute, provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and

> one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 3282(a), the general limitations statute, provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT

1. Both questions presented in this case address the consequences of a failure to raise an issue at or before trial. The first question asks to what extent the government is bound by heightened burdens in jury instructions to which it did not object. The courts of appeals agree that, as a general rule, such instructions bind the government as the law of the case when evaluating the sufficiency of the evidence. The courts of appeals diverge, however, over whether there is an exception to the general rule where the error in the jury instruction is clear or "plain" but the indictment itself is correct. The sole issue for this Court is whether the general rule measuring the sufficiency of the evidence against the charge as given to the jury without government objection is subject to such an exception.

The second question asks whether the failure of a defendant's trial lawyer to raise a statute-of-

limitations bar constitutes waiver precluding consideration of the issue under any standard of review on appeal. Three circuits hold that the limitations bar may be reviewed for plain error or otherwise. Seven circuits, including the Fifth Circuit below, hold that the bar is waived and unreviewable.

The government would resolve both of those questions against defendants: imposing on defendants the draconian consequence of complete waiver for failure to raise a statute-of-limitations bar, but allowing prosecutors to escape the law-of-the-case consequences of their failure to object to an unfavorable jury charge. Such a pro-government/anti-citizen approach not only is inconsistent with a proper construction of the law on the relevant issues, it also is diametrically opposed to our deep-seated interests in checking government power – particularly the dangerous power to deprive citizens of their liberty. Those interests and principles of lenity do indeed favor an asymmetrical treatment of failures to object, but it is an asymmetry in favor of defendants and of limiting government power, not the reverse.

2. The questions presented by this case arise in connection with a prosecution for conspiring to make, and making, unauthorized access to a protected computer. Such alleged access occurred in the course of business competition between two companies.

Prior to 2004, Petitioner Musacchio was the president of Exel Transportation Services ("Exel" or "ETS"), a transportation brokerage company that arranges freight shipments for business clients. Pet. App. A1. Musacchio resigned from ETS on September 9, 2004, and in November 2005 (after expiration

of his non-compete agreement) founded a competing company. Two ETS employees – original co-defendants Roy Brown and Michael Kelly – later joined Petitioner at his new company.

As the two companies competed for sales agents, ETS became suspicious about certain information Petitioner and his new company seemed to possess regarding ETS and eventually concluded that Petitioner and others must have obtained that information from ETS emails.

3. On November 2, 2010, the United States indicted Petitioner, Brown, and Kelly for accessing and conspiring to access the protected computers of their former employer, ETS, in violation of 18 U.S.C. § 1030(a)(2)(C). JA 46-79. That statute provides criminal penalties for anyone who "intentionally accesses a computer without authorization *or* exceeds authorized access, and thereby obtains— * * * information from any protected computer" (emphasis added). What is most relevant for present purposes is that the statute provides for two discrete means of committing the crime: either (1) accessing a computer "without authorization" or (2) "exceed[ing] authorized access" to a computer. *See LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1133 (9th Cir. 2009) (noting the differences between unauthorized access and exceeding authorized access, and interpreting statute to give effect to both phrases); Pet. App. A5-A6 (recognizing distinct and disjunctive means of violating statute).

In the initial Indictment, the government charged the three defendants with conspiring to engage in, and engaging in, *both* types of computer access.

JA 49 (Count 1: "Conspiracy To Make Unauthorized Access to Protected Computer and to Exceed Authorized Access to Protected Computer"); JA 68-69 (Counts 2-22: charging "Exceeding Authorized Access to Protected Computers" against defendants Brown and Kelly); JA 70 (Counts 23-24: charging "Unauthorized Access to Protected Computers" against Petitioner Musacchio). The Indictment repeatedly alleged that various co-conspirators *exceeded* authorized access under the government's broad theory of that crime. *See, e.g.*, JA 50-51 (alleging Petitioner "directed unindicted coconspirators * * * to exceed any authorized access to Exel's protected computers"); JA 53, 56, 60 (multiple allegations that Brown "exceeded his authorized access"; alleging unindicted co-conspirator sent Musacchio proprietary information from Exel).

After defendants Brown and Kelly pled guilty, however, the government filed a Superseding Indictment on September 6, 2012, and a Second Superseding Indictment on January 8, 2013. JA 80-84; JA 89-114.[1] The superseding indictments altered the charges against Petitioner in a number of ways. For Count 1, the charge was ostensibly narrowed to "Conspiracy To Make Unauthorized Access to Protected Computer," dropping the conspiracy to "Exceed Authorized Access." *Compare* JA 49 *with* JA 92; *see also* Pet. App. A2-A3. Despite having removed references to "exceed[ing] authorized access" from the charges

---

[1] The Superseding Indictment and Second Superseding Indictment are not materially different from each other for purposes of the issues before this Court.

specified, the government kept in the superseding indictments various allegations relating to that distinct crime and to a conspiracy that included exceeding authorized access as its object. *See, e.g.*, JA 81-82, 92-99, 102-03.

For Count 2, the alleged date of Petitioner's unauthorized access was expanded from one day to three days, and the protected computer allegedly accessed was changed from "Exel Server" to "Exel email accounts of Exel President and Exel legal counsel." *Compare* JA 71 *with* JA 112. By so expanding and altering the acts alleged for Count 2, the government brought into play an unknown number of additional alleged unauthorized accesses and thus expanded the scope of the charges against Petitioner.

The final charges against Petitioner consisted of one count of conspiracy to make unauthorized access (Count 1) and two substantive counts of making unauthorized access (Counts 2 and 3).

On their faces, the superseding indictments of September 6, 2012 and January 8, 2013 were filed roughly seven years after the November 23 through 25, 2005 acts alleged as the basis for Count 2. JA 84, 112.

4. At trial the government sought to show that various alleged co-conspirators accessed ETS computers both while still employed there and after they had left, and provided Petitioner with confidential information. In doing so, the government comingled its purported evidence of external (without authorized) access to ETS computers with its purported evidence of internal (exceeds authorized) access to ETS computers by persons within the company who then sent company information to Petitioner. Pet. App. A3; JA

127-34 (opening statement describing upcoming evidence); 135 (direct examination); JA 146-49, 151-53 (closing argument discussing evidence).

5. At the close of the trial, and without objection from the government, the district court instructed the jury regarding the conspiracy count that:

> Title 18 U.S.C. § 1030(a)(2)(C) makes it a crime for a person to intentionally access a protected computer *without authorization* **and** *exceed authorized access*, and thereby obtain information * * *
>
> For you to find the defendant guilty of this crime, you must be convinced that the government has proved * * *
>
> First: That the defendant and at least one other person made an agreement to commit the crime of unauthorized access to a protected computer in violation of 18 U.S.C. § 1030(a)(2)(C) *as defined above.*

JA 168 (emphasis added); Pet. App. A3.

Having defined the two alternative methods for committing the underlying crime in the conjunctive, this instruction made *both* access without authorization *and* exceeding authorized access required elements of the crime and hence of the conspiracy to commit that crime.

Beyond that conjunctive instruction, however, the court did not define either type of access for the jury, drew no distinction between "exceed[ing] authorized access" and "access[ing] a computer without authorization," gave no guidance on what proof might be required for each, and gave no instruction regarding

the need for unanimity as to each and both of those crimes. *See* JA 173-74 (requiring unanimity as to discrete punishment factors but not as to discrete types of illegal access). As a practical matter, the charge conveyed those discrete forms of prohibited access ("without authorization" and "exceeds authorized access") as if they were a single crime of unauthorized access without alerting the jury to the differences between the two or, indeed, whether they were even two discrete concepts at all.

6. The government did not object to the court's conjunctive definition of the crime and, in fact, argued in its closing that Petitioner and his alleged coconspirators had also "exceeded" authorized access – a crime the government specifically removed from the formal charge in the superseding indictments. *See* JA 147-52. Indeed, the government drew little distinction between its examples of access without authorization and exceeding authorized access and made no argument that the jury needed to find a conspiracy to commit both types of access.

7. On March 1, 2013, the jury returned a general verdict of guilty on all counts. JA 178-79.

8. Following the verdict, Petitioner moved for a new trial or an acquittal, arguing, *inter alia*, that the jury charge required the government to prove an agreement *both* to engage in access without authorization and to exceed authorized access, that there was insufficient evidence to establish the latter, and that the unanimity-of-theory instruction did not address those two elements. Motion for a New Trial, Mar. 15, 2013 [Dkt. 170]; Supplemental Motion for Judgment of Acquittal, Aug. 29, 2013 [Dkt. 199]; Se-

cond Supplement to Motion for Acquittal, Nov. 19, 2013 [Dkt. 221].

9. The district court orally rejected the motion for a new trial, Pet. App. D2, made no express ruling on the supplemental motion for acquittal, and, on November 19, 2013, entered judgment against Petitioner sentencing him to sixty months imprisonment on Counts 1 and 2 concurrently, and three consecutive months on Count 3. Pet. App. B1-B3.

10. Petitioner timely appealed to the Fifth Circuit, arguing, *inter alia*, that the conjunctive jury instruction for Count 1 was the law of the case and binding on the government, and that there was insufficient evidence as a matter of law to establish the "exceeds authorized access" crime. Pet. App. A5. The primary argument regarding the sufficiency of the evidence for "exceeds authorized access" turned on how that element should be interpreted. The circuits are split regarding whether it is the "access" to the information itself that must exceed authorization or whether the mere *misuse* of information obtained through authorized access will satisfy the "exceeds" requirement. *Compare United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) (*en banc*) (narrow view of "exceeds authorized access" language excluding subsequent misuse of materials *accessed* within authority; noting disagreement among the circuits), *with United States v. John*, 597 F.3d 263, 271 (5th Cir. 2010) (broad view that "exceed[ing] authorized access" "may encompass limits placed on *the use* of information obtained by permitted access to a computer system") (emphasis in original). The evidence in this

case would not satisfy the narrower construction of the statute.

Petitioner also argued, given the mixed allegations and arguments regarding access without authorization and exceeding authorized access, and the lack of a unanimity instruction on those separate elements, that there was no way to know whether the jury was unanimous as to *both* elements or whether different jurors may have reached their conclusion based on different theories. *See* Pet. App. A7-A8; Brief of Appellant at 20-23, 27-28.

Finally, Petitioner raised, for the first time on appeal, a statute-of-limitations bar, arguing that Count 2 was based on events occurring more than five years before the superseding indictments were filed. *See* 18 U.S.C. § 3282(a) (5-year limitation period); JA 80, 89 (September 6, 2012 and January 8, 2013 filing dates); JA 84, 112 (November 23-25, 2005 alleged access dates). Petitioner further argued that the government was not entitled to claim that the superseding indictments related back to the initial Indictment because Count 2 of the Superseding Indictment significantly altered the charges against him, expanding their chronological scope three-fold and altering the description of what Petitioner allegedly accessed on those dates. Pet. App. A8-A9; Brief of Appellant at 48-50.

11. On November 10, 2014, the Fifth Circuit affirmed Petitioner's conviction and sentence. Pet. App. A1.

Regarding the law-of-the-case/sufficiency-of-the-evidence challenge to Count 1, the court of appeals reviewed the issue *de novo*. It acknowledged the er-

ror in the jury charge: that the district court "incorrectly instructed the jury that it had to find that Musacchio had agreed to make unauthorized access *and* exceed authorized access." Pet. App. A5 (emphasis in original). And it acknowledged that the government had not objected to the instruction. *Id.*

The court recognized the general rule that " '[a]n instruction that increases the government's burden and to which the government does not object becomes the law of the case.' " Pet. App. A5-A6 (citation omitted). However, the court of appeals held that the law-of-the-case "rule does not apply where (1) 'the jury instruction * * * is patently erroneous and (2) the issue is not misstated in the indictment.' " *Id.* (quoting *United States v. Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), *cert. denied*, 546 U.S. 1115 (2006)).

Finding that the jury instruction was obviously in error, the court held that the so-called *Guevara* exception to the law-of-the-case doctrine applied. Pet. App. A6-A7. The majority opinion did not reach whether the evidence was sufficient to demonstrate an agreement to exceed authorized access, and did not address the circuit split bearing upon that issue. *See supra* at 11.

Regarding Petitioner's statute-of-limitations argument that the superseding indictments came more than five years after the events charged in Count 2, the court held that because it was not raised in the district court it was waived. Pet. App. A8 (citing *United States v. Arky*, 938 F.2d 579, 582 (5th Cir. 1991) (per curiam), *cert. denied*, 503 U.S. 908 (1992)).

Judge Haynes concurred in the judgment, but declined to join the court's reasoning as to the law-of-

the-case exception. She instead would have concluded that there was sufficient evidence for "both prongs ('exceeds authorized use' and 'unauthorized access') and, therefore would not reach the issue." Pet. App. A16. In order to reach that conclusion, she relied upon *John*, 597 F.3d at 270-73, in which the Fifth Circuit had articulated a broad view of "exceeds authorized access," contrary to the narrower view adopted by the Ninth Circuit and others. *See supra* at 11.

12. On December 9, 2014, the Fifth Circuit denied Petitioner's petition for rehearing *en banc*. Pet. App. C1-C2.

13. Petitioner began serving his sentence on February 11, 2015. JA 24-25.

SUMMARY OF ARGUMENT

1. When a jury charge setting forth the elements of a crime erroneously imposes, without objection, additional or stricter burdens on the government than required by the underlying statute, the generally accepted rule is that those elements become the law of the case, binding on the government at later stages of the proceeding. Such additional or stricter elements thus set the baseline for measuring the sufficiency of the evidence for any subsequent verdict to convict.

The exception applied by the court of appeals, refusing to follow the law-of-the case doctrine where the instructional error is plain and the heightened burden is not replicated in the indictment, is unwarranted and inconsistent with the broadly accepted general rule. The doctrine, by its nature, applies only in cas-

es of error, and its rationale does not change based on the magnitude of the error involved. While other versions of the law-of-the-case doctrine are more lenient where an objection was made but erroneously rejected by a court, where a criminal jury has relied on the more stringent description of the law without government objection, there is no justification for allowing the government to avoid the consequences of its choices.

Enforcing the law-of-the-case doctrine, regardless of the plainness of the error, is more consistent with the asymmetrical roles of the government and the accused, with our system's broad concern with checking the government's dangerous power to deprive persons of their liberty, and with the uniformly accepted application of the doctrine where a less-than-plain error imposes extra-statutory burdens or where the indictment itself assumes even clearly erroneous extra burdens.

That the unobjected-to error is contained in the jury charge and is more obvious only strengthens the case for applying the doctrine. The elements as described in the jury charge are more likely to have synergistic effects on the arguments to, and deliberations by, the jury than the elements in the indictment, and later ignoring an instructed element deemed erroneous is more likely to be prejudicial. The inherent uncertainty created by adding an element to the jury's deliberations, but then ignoring that element during subsequent review, supports the doctrine's prophylactic rule requiring adherence to the elements in the jury charge as given. Likewise, the government has less of an excuse for acquiescing

in a "plain" error than in a debatable one. That the government's acquiescence in such error might ultimately preclude it from imposing punishment on a defendant is not at all unjust, it instead is consistent with the many checks we place on the government's exercise of a great and dangerous power.

Nor do the due-process underpinnings of review for sufficiency of the evidence limit the application of the law of the case at such later stage in the proceedings. Any effect the law-of-the-case doctrine has on those later proceedings is merely a *consequence* of how the law is defined to the jury. But the reasons for sufficiency review are not required predicates for the law-of-the-case doctrine. Many legal rules will have a consequence for sufficiency review – excluding relevant but prejudicial or illegally obtained evidence, for example – but do not depend upon the rationale of sufficiency review to give them force. Furthermore, the due-process concerns with ensuring that the evidence could support a jury rationally finding, beyond a reasonable doubt, the elements charged in the *indictment* (including erroneous extra-statutory elements) apply as much if not more to reviewing whether such evidence could support a rational finding of the elements the jury was in fact *instructed* to consider. That a jury lacking sufficient evidence to convict was necessarily irrational in applying the instructions it was given is not saved by the suggestion that they could have rationally reached their conclusion under different instructions.

2. The mere failure to raise a statute-of-limitations bar before or during trial does not irre-

trievably waive such bar so as to preclude consideration of the issue on appeal.

Despite broad resistance to the idea in the courts of appeals, the statute of limitations contained in 18 U.S.C. § 3282(a) is a jurisdictional limit on the government's power to prosecute, try, and punish persons for non-capital offenses. The various factors identified in this Court's cases distinguishing between jurisdictional rules and claims-processing rules strongly support a jurisdictional view of § 3282(a). The wording of the provision reflects an express and definitive prohibition on untimely action, not merely a scheduling request. That wording is more definitive than other filing time limits this Court has found to be jurisdictional. The provision also was enacted by Congress and is applicable to Article III courts, factors whose absence this Court has considered in other cases finding a rule to be non-jurisdictional. Additionally, the background principles applicable to criminal statutes of limitations all favor a strict construction of such statutes against the government. Because the limitations bar in § 3282(a) is properly viewed as jurisdictional, it cannot be waived.

Attempts to characterize the limitations bar as a waivable affirmative defense based on archaic cases discussing anachronistic pleading rules do not supersede, or alter the result from, this Court's current jurisprudence distinguishing jurisdictional and claims-processing rules. Those cases arose in a very different era and context, did not consider the jurisdictional question, and the pleading rules they apply have been abolished. And apart from any formal characterization of the limitations period, the wording and

function of § 3282(a), this Court's current case law, and the weighty policy concerns supporting statutes of limitations all support treating the limitations bar as non-waivable.

Even if the limitations bar were indeed waivable, defense counsel's mere failure to raise the issue is not sufficient to establish such waiver. Waiver is the intentional relinquishment of a known right, as opposed to forfeiture, which is the failure to timely assert a right. This Court's requirements for knowing waiver of important rights, and its treatment of government waivers or forfeitures of limitations bars in the habeas context, all support requiring far more than counsel's mere oversight or neglect in order to find an actual waiver precluding consideration of a limitations bar on direct appeal. Absent a knowing and intentional waiver, appellate courts should be free to consider potential limitations bars. At a minimum, such arguments should be reviewed for plain error given that the government's failure to abide by an express congressional prohibition against prosecution, trial, and punishment based on untimely indictments seriously affects the integrity, fairness, and public reputation of judicial proceedings.

Considering and, if necessary, enforcing, even forfeited time-bars, by contrast, furthers a variety of policy interests in checking government and avoiding collateral litigation over potential ineffective assistance of counsel. The public, the courts, and the litigants are thus all better served by appellate consideration of potential limitations bars notwithstanding any oversight in not raising them earlier.

ARGUMENT

I. The Elements of a Crime as Instructed in the Jury Charge, without Government Objection, Are the Binding Law of the Case for which there Must Be Sufficient Evidence.

When the government does not object to a criminal jury charge that is more onerous to the government than required by the relevant statute, it is the generally accepted rule that the more rigorous charge becomes the law of the case. *See, e.g., United States v. Jokel*, 969 F.2d 132, 136 (5th Cir. 1992) ("An instruction that increases the government's burden and to which the government does not object becomes the law of the case"). The jury having considered the case, without government objection, under such more stringent legal requirements, a court subsequently evaluating the sufficiency of the evidence will do so under the same heightened requirements of proof. *See United States v. Ausler*, 395 F.3d 918, 920 (8th Cir.), *cert. denied*, 546 U.S. 861 (2005).[2]

---

[2] The government asserts, BIO 8 & n. 3, that this Court's decision in *United States* v. *Wells*, 519 U.S. 482 (1997), "suggests that the law-of-the-case doctrine is best viewed as a prudential measure that appellate courts may, but are not required to, apply depending on the particular context at issue." BIO 9. This Court in *Wells* did not rule on the applicability of a properly raised law-of-the-case argument, but merely that the doctrine, seemingly raised for the first time *after* certiorari was granted, was insufficient to prevent the Court from applying its traditional rule permitting review of a legal issue that had been resolved in the court of appeals. *Wells*, 519 U.S. at 487-88. There is not even a hint in the court of appeals decision that defendants invoked law of the case to foreclose the government from

Unlike other doctrines falling under the broad rubric of "law of the case," this specialized version of the doctrine combines three distinct features: it applies to the legal standards set forth in a (1) jury charge in a (2) criminal case to which (3) the government has not objected. Those three features strengthen and inform the doctrine and undermine any case for creating arbitrary exceptions to its application. [3]

A. The Law-of-the-Case Doctrine and the Conflict Over Whether It Is Subject to a Plain-Error Exception.

As a general rule, virtually every court to consider the issue applies the law-of-the-case doctrine to jury instructions that erroneously increase the government's burden of proof in criminal cases. *See Guevara*, 408 F.3d at 258 (citing *Jokel*, 969 F.2d at 136, for the general law-of-the-case rule); *Ausler*, 395 F.3d at 920 (an erroneous and more stringent jury instruction given without government objection was the law of the case when reviewing defendant's sufficiency challenge); *United States v. Williams*, 376 F.3d 1048,

---

deny[illegible]g it as an element. *United States v. Wells*, 63 F.3d 745, 749-51 (8th Cir. 1995), *rev'd*, 519 U.S. 482 (1997). Rather, whether materiality was an element was litigated and decided on the merits and defendants' invocation of that doctrine in this Court was insufficient.

[3] The phrase "law of the case" also is used to describe the respect given prior appellate rulings at subsequent stages of the same case or the strong presumption against revisiting disputed matters already resolved by the same court at an earlier stage of the case. Those variations on the doctrine often present different concerns and generally do not involve the full combination of elements at issue here.

1051 (10th Cir. 2004) (recognizing that "the government [has] the burden of proving each element of a crime as set out in a jury instruction to which it failed to object, even if the unchallenged jury instruction goes beyond the criminal statute's requirements").[4] Neither the government nor the court of appeals in this case disputed the validity of the general rule.[5]

Courts applying the law-of-the-case doctrine to criminal jury instructions reason that the government should not be allowed to revive a position it has abandoned in the trial court and that a court of appeals should not sustain a conviction on a theory that varies from the one on which the jury was instructed. *See Williams*, 376 F.3d at 1051 (purpose of law of the case "is to prevent the government from arguing on appeal a position which it abandoned below"); *United States v. Angiulo*, 897 F.2d 1169, 1196-97 (1st Cir. 1990) ("If we were to treat the instruction otherwise [than as law of the case], * * * we would be sustaining

---

[4] *See also, United States v. Staples*, 435 F.3d 860, 866-67 (8th Cir.) (applying law-of-the-case doctrine to erroneously conjunctive instruction treating an alternative element as an additional element), *cert. denied*, 549 U.S. 862 (2006).

[5] A corresponding rule applies where the more stringent legal standard is set forth in the indictment and such heightened standard likewise becomes law of the case. *See, e.g., United States v. Zanghi*, 189 F.3d 71, 79 (1st Cir. 1999) ("The terms of an indictment can raise the bar of proof for the government to a higher level than the bare minimum required by the terms of a criminal statute because the terms of the indictment specify the 'crime charged.' "); *United States v. Taylor*, 933 F.2d 307, 310 (5th Cir. 1991) (specific intent for crime of escape became element of offense, under law of the case, where defendant was indicted for willful escape and jury was instructed on specific intent).

a conviction on appeal on a theory upon which the jury was not instructed below. This we cannot do.").

Requiring sufficient evidence to satisfy the elements contained in the jury charge as given, even where erroneously more burdensome than the statutory elements, also tends to mitigate the risks inherent in having the court and jury apply different legal standards. Such risks include: jury consideration of extraneous and potentially prejudicial additional conduct or crimes; confusion regarding the interplay between original and added elements; use of the broader conduct added by the instructions to satisfy burdens of proof for the more limited conduct actually charged as a crime; and, where disjunctive alternate crimes are charged conjunctively as if a single crime, the potential for lack of unanimity regarding whether one, the other, or both crimes were proven.[6]

Despite the uniform acceptance and sound reasons supporting the general law-of-the-case doctrine, the First and Fifth Circuits refuse to apply the rule when

---

[6] In this case, for example, although Count 1 only charged a conspiracy to access a computer "without authorization," and Counts 2 and 3 only alleged access without authorization on four specific days, the government offered and argued numerous instances of conduct it characterized as co-conspirators "exceeding authorized access." *See* JA 127-34, 135, 146-53. Even though Petitioner was no longer indicted for a conspiracy to exceed authorized access, because the jury charge combined those separate crimes under the rubric of "unauthorized" access, the jury may well have considered such uncharged "bad acts" as proof of the narrower crime actually charged. Measuring the sufficiency of the government's evidence against the added element in the jury charge may not cure all such problems, but it certainly mitigates the risk, present in this case, that the jury relied on the added element without sufficient evidence to do so.

a more stringent jury instruction is "patently incorrect" and the indictment states the correct and more lenient legal standard. *United States v. Zanghi*, 189 F.3d 71, 79-80 (1st Cir. 1999), *cert. denied*, 528 U.S. 1097 (2000); *Guevara*, 408 F.3d at 258 ("erroneous jury instruction increasing the government's burden "may not become law of the case if both (1) it is patently erroneous and (2) the issue is not misstated in the indictment."). Neither court offers much explanation for adopting such an exception.

The Eight Circuit has taken a somewhat different approach, rejecting both a strict application of the law-of-the-case doctrine and "the relatively government-friendly" exception applied in the First and Fifth Circuits. *United States v. Johnson*, 652 F.3d 918, 922-23 (8th Cir. 2011) (first applying law-of-the-case to measure sufficiency of the evidence for an erroneously *substituted* element and then, if the government fails, providing it an opportunity, under a "rigorous standard of review" to try to establish, as to the mistakenly *omitted* element, that " 'the evidence is so overwhelming or incontrovertible that there is no reasonable doubt that any rational jury would have found that the government proved the statutory element.' ") (citation omitted); *United States v. Inman*, 558 F.3d 742, 748 (8th Cir.) (looking to justification for sufficiency-of-the-evidence review to question application of law-of-the-case doctrine), *cert. denied*, 558 U.S. 916 (2009).

Inman addressed the combined errors of added and omitted elements, but reached a distinctly peculiar result. According to *Inman*, a conviction will be upheld if the government shows sufficient evidence to

satisfy the erroneously substituted element, and will also be upheld if, though lacking sufficient evidence for the substituted element, the government can show that the evidence of the omitted element not even considered by the jury was such that any rational jury would have found such element beyond a reasonable doubt. 558 F.3d at 749. That result effectively and erroneously applies the law-of-the-case doctrine *against* the defendant to allow the government satisfy a non-element *instead of* an actual, but omitted, element, applying harmless error standards only if the government fails sufficiency review on the substituted element.

Neither the plain-error exception of the First and Fifth Circuits, nor the more complicated approach of the Eighth Circuit are warranted.

B. The "Plainness" of Error in a Jury-Instruction Does Not Support a Law-of-the-Case Exception.

The "plain error" exception advocated by the government and applied by the court of appeals below makes little sense in light of the well-accepted general rule and the purposes behind that rule. In every application of the law-of-the-case doctrine it is accepted, or at least assumed, that the jury instruction was erroneous and imposed extra-statutory burdens on the government. (If the instruction were correct, there would be no need for the doctrine at all.) The critical fact is not the *existence* of error, but the government's lack of objection to, and hence acceptance of, the erroneous additional burden. The plainness or

debatability of the error simply has nothing to do with the matter.

This Court has held that the plainness and even egregiousness of an error in adding an extra-statutory element to a crime is of no moment for purposes of the Double Jeopardy Clause where an acquittal was based on such plain error. *See Evans v. Michigan*, -- U.S. --, 133 S. Ct. 1069, 1073-74, 1075 (2013) (enforcing double jeopardy consequences of erroneous acquittal based on unproven "element" not actually required by statute, regardless whether it was " 'based upon an egregiously erroneous foundation,' "; recognizing that there was "no question the trial court's ruling was wrong" and "predicated upon a clear misunderstanding" of the law) (citation omitted). So too here, *any* application of the law-of-the-case doctrine necessarily attaches significance to an erroneous articulation of law. The plainness of such error does not affect its essential character as an unobjected-to error that nonetheless binds the government.

The government defends a plain-error exception by pointing to a similar exception in cases applying other versions of the law-of-the-case doctrine. BIO at 10 (*citing Pepper v. United States*, 562 U.S. 476, 506 (2011), *Agostini v. Felton*, 521 U.S. 203, 236 (1997), and *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983)). *In Arizona*, for example, this Court recognized a commonly applied exception to certain applications of the law-of-the-case doctrine where a court is "convinced that [a prior ruling] is clearly erroneous and would work a manifest injustice." 460 U.S. at

618 n. 8. Those cases do not support a similar exception here.

First, such cases are quite different from this case, applying a different version of the law-of-the-case doctrine. In *Agostini*, for example, this Court declined to apply the law-of-the-case doctrine to sustain an injunction against sending public school teachers into parochial schools to help educate disadvantaged children. The injunction was entered years earlier on Establishment Clause grounds, but this Court had since overruled the previously controlling precedent. 521 U.S. at 236. Applying the law of the case where the constitutional basis for the injunction had evaporated and the State's fully preserved objection was ultimately vindicated is not even remotely comparable to the circumstances in this case.

Similarly, while this Court in *Arizona v. California* noted an exception for a "clearly erroneous" ruling that "would work a manifest injustice," it cited civil cases with preserved objections and ultimately declined to apply the exception to the original-jurisdiction case before it. *See* 460 U.S. at 618 n. 8.

Pepper, by contrast, was a criminal case, but addressed the impact of a sentencing determination that was indeed disputed and which had been vacated by the court of appeals and remanded for *de novo* resentencing. 562 U.S. at 506-07. The court of appeals having wiped the slate clean of the earlier sentence, it hardly stood as law of the case on remand for resentencing. Again, that case has no bearing on the very different version of the law-of-the-case doctrine at issue here.

Unlike the more common situation in cases where there *was* an objection by the party challenging the law of the case, here the government made no objection and hence it is irrelevant whether the error is debatable or obvious. The primary waiver concerns and change-of-position concerns apply with equal strength regardless whether an error is plain or debatable.

Second, given the uniform acceptance of the law-of-the-case doctrine to bind the government where the jury-charge error is something less than "plain," or is mirrored in the indictment, the objection to a "plainly" erroneous extra element lacks substance. If the error is indeed obvious, the government should have objected. The plainness of an error resolving a *contested* question in other applications of law of the case matters primarily because it stands as a strong indictment of the trial court's initial decision to reject arguments pointing out that error, helping to overcome finality concerns.

In the criminal context, plain-error review is typically invoked by defendants, not the government. The plainness of an error that prejudices a defendant matters because of concerns with improperly convicting or punishing the accused, the integrity of the courts, and because the government's role as an *adversary* is tempered by its duty to do justice rather than take any advantage that comes its way. None of those concerns exist when the roles are reversed and, if anything, some of them continue to weigh in favor of the accused. When applying the law of the case against the government, therefore, the plainness of the error makes it all the *more* compelling to enforce

its consequences because it stands as an even stronger indictment of the government's failure to object in the first place. Insofar as the government acknowledges that it is bound by its acquiescence to error on a close question, it has no credible argument for not being bound by its acquiescence to what it claims is an obvious error.[7]

Third, the government's claim, BIO at 10, that an obvious mistake can be corrected because "no prejudice would result to the defendant" ignores that it would be the government's burden to demonstrate lack of prejudice. *Cf.* FED. R. CRIM. P. 52(a) (harmless error test); *United States v. Olano*, 507 U.S. 725, 741 (1993) (noting opposite burdens of proof regarding prejudice for harmless error versus plain error under Rule 52(a) and (b)). While it would ordinarily be a defendant's burden to prove prejudice from erroneous jury instructions, Petitioner is *not* arguing before this Court that the instructions were erroneous; he is trying to enforce those instructions and hold the government to the natural and legal consequences of those instructions. It is instead the government that argues that *ignoring* one of the elements charged to the jury should be allowed because of plain error and alleged lack of prejudice.

The effect of an additional element on the handling of the case or on jury deliberations may often be diffi-

---

[7] The manner in which courts treat extra-statutory elements included in an indictment as binding regardless of the degree of error is instructive. Had the indictment itself added an additional element not required by the statute, the Fifth and Fifth Circuit exceptions to the law of the case doctrine would be inapplicable. *See supra* at 21 n. 5, 23.

cult to prove one way or the other. There are a variety of risks from such additional elements, and from trying to ignore them after the jury has considered them in its deliberations. *See supra* at 21-22. While a defendant might have a difficult time proving prejudice from such risks, the government would have an equally if not more difficult time proving the absence of prejudice.

In this case, for example, the inclusion of "exceed[ing] authorized access" as an issue impacted the proceedings from beginning to end, and it would be far from harmless simply to ignore it as a now inconvenient hurdle to upholding the conviction. It allowed the government to suggest a legally distinct additional type of wrongdoing and bring in arguments and evidence to that effect. *See* JA 127 (prosecution's opening statement) ("The evidence will show that [various ETS employees] were basically unindicted co-conspirators in this indictment; that they exceeded their authorized access at Exel and provided Musacchio with sensitive Exel business documents"); *id.* (arguing that insider ETS employees sent defendant "thousands of documents that were taken from Exel by these individuals, exceeding authorized access" and they did so to provide "a competitive advantage for TTS, which would result in private financial gain to them").

Having spent so much time arguing a conspiracy with an object of exceeding authorized access, it is implausible for the government now to suggest that such arguments had no impact on the case and hence the added element need not have been proven with sufficient evidence. If the government can instead be

excused from having to prove that added alleged illegality with sufficient evidence, then it is no different than the government being allowed to introduce evidence and arguments regarding any number of uncharged and unproven crimes.

Furthermore, because the government routinely comingled evidence and arguments concerning the two types of "access," it cannot now demonstrate that the jury likewise did not treat them as interchangeable. Petitioner suggested as much on appeal when challenging the lack of a unanimity charge and arguing that there was no way to tell if the jury was unanimous as to each of the legally separate, but functionally undistinguished, elements of access without authorization and exceeding authorized access. *Supra* at 11. The Fifth Circuit rejected that argument, in part because defendant had not made that objection below and hence faced the difficult hurdle of plain-error review. Pet. App. A7.

In such circumstances, the shift in the burden of proof is significant because it places the risk of uncertainty squarely on the government. Concerns that may have been insufficient to *meet* the burden of proof for prejudice likely will be more than sufficient to *prevent* the government from establishing a lack of prejudice. *Olano*, 507 U.S. at 742-43 (Kennedy, J., concurring) (noting significance of shifts in burdens of proof where under harmless-error analysis, it would be "difficult for the Government to show the absence of prejudice, which would be required to avoid reversal of the conviction under Rule 52(a)," but under plain-error analysis "[d]efendants seeking reversal

under Rule 52(b) are also likely to experience these difficulties in proving prejudice").

Finally, even assuming that the plainness of an error was relevant to applying the law-of-the-case doctrine to more stringent jury instructions, a claim that such error resulted in "manifest injustice," *Arizona v. California*, 460 U.S. at 618 n. 8, lacks credibility when invoked by the government in a criminal case.

While enforcing the law of the case might result in manifest injustice in other contexts – for example where it would lead to the wrongful *conviction* of a defendant – enforcing the consequences of government action or inaction that potentially checks its ability to deprive a citizen of his or her liberty can rarely, if ever, be deemed manifestly unjust. While the government has the *power* to take away a citizen's freedom by force, our history and Constitution have not viewed that power as tantamount to a "right." Rather, that power is viewed as a dangerous, though admittedly necessary, evil to be vigilantly and suspiciously cabined by a plethora of direct and prophylactic means.

Accused citizens are given the benefit of the doubt whenever uncertainty exists or competing values are implicated. *United States v. Santos*, 553 U.S. 507, 514-15 (2008) (plurality opinion) (rule of lenity); *Smith v. United States*, 360 U.S. 1, 9 (1959) (noting "traditional canon of construction which calls for the strict interpretation of criminal statutes and rules in favor of defendants where substantial rights are involved"). The government is routinely precluded from prosecuting, trying, or punishing citizens regardless whether, in a Platonic world of perfect information

and judgment, they have broken the law. The exclusion of evidence from illegal searches, application of the Double Jeopardy Clause, and application of the statute of limitations are but a few obvious examples. Those outcomes are not viewed as "unjust," much less "manifestly" so. Rather, they are viewed as an acceptable, if occasionally troubling, cost of keeping government in check.

Forcing the government "to turn square corners," *United States v. Jimenez Recio*, 537 U.S. 270, 279 (2003) (Stevens, J., concurring in part and dissenting in part), and holding it to the consequences of its choices and even its mistakes, may hamper the exercise of its power to punish, but in the criminal-law context that is not manifestly unjust. Even were the plain-error exception to the law-of-the-case doctrine theoretically applicable, therefore, it cannot properly be satisfied for the benefit of prosecutors.

C. The Rationale for Reviewing the Sufficiency of the Evidence Does Not Support a Law-of-the-Case Exception.

The government also defends the decision below by claiming that sufficiency-of-the-evidence review only applies to ensure that "the defendant's guilt has been established by 'proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is *charged*,' " in accordance with due process requirements. BIO at 6-7 (citing *In re Winship*, 397 U.S. 358, 364 (1970), and *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979)) (emphasis added); *see also*, *Inman*, 558 F.3d at 748 (same). Accordingly it claims that such review need not be conducted on uncharged

elements that are not part of the statutory definition of the crime. The government's argument both misses the point and is incorrect on its own terms.

First, shifting the focus to the *consequences* of an instruction becoming the law of the case, and away from the government's acceptance of the heightened burdens and the jury's deliberations according to such instructions, ignores the point of the law-of-the-case doctrine. That doctrine does not claim constitutional magnitude itself, but rather is an estoppel of sorts, serving purposes in support of the adversary system, the jury system, and providing a check on prosecutorial power. Those purposes may also have due process implications, but they are separate from, and in addition to, the reasons for requiring sufficiency-of-the-evidence review. That the law of the case, once established, will set a baseline for a variety of subsequent legal determinations is simply a consequence of so defining, correctly or not, the applicable law. *See, e.g., Evans*, -- U.S. at --, 133 S. Ct. at 1075-76, 1078 (erroneous reliance on extra-statutory element to acquit for insufficient evidence triggers Double Jeopardy Clause notwithstanding "clear" error in including such element). The enforcement of many types of rules will have a *consequence* bearing on sufficiency-of-the-evidence analysis. The exclusion of evidence for prejudice or Fourth Amendment reasons plainly impacts the sufficiency analysis, but does not depend upon the justifications for sufficiency analysis. So too here.

Second, by emphasizing review of the elements of the crime "charged" in the indictment, rather than as "charged" to the jury, the government draws an arti-

ficial line that makes little sense. Due-process concerns are not limited to the sufficiency of the evidence for elements of the crime as charged in the *indictment* rather than as "charged" to the jury. Indeed, erroneous elements in an indictment are no more a reflection of the elements required by Congress than are erroneous elements in a jury charge, yet they still become law of the case and establish a baseline to measure of the sufficiency of the evidence.[8] Accordingly, the requirements of the underlying *statute* cannot be said to be the critical touchstone of due process when looking at the sufficiency of the evidence.

And if the due process concern is in providing some minimum assurance that the jury applied the beyond-a-reasonable-doubt standard, *Jackson*, 443 U.S. at 316, it is irrelevant whether the extra element they considered was in the indictment or in the jury instructions. For example, the standard of review for sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the

---

[8] Curiously, the indictment in this case *charged* unauthorized access, but repeatedly *alleged* unauthorized access and exceeds in the conjunctive. JA 92-94. Due to a quirk of law that allows the government to indict in the conjunctive, but try and submit the case to the jury in the disjunctive, the indictment was not deemed erroneous and did not itself trigger the law of the case. *See United States v. Pigrum*, 922 F.2d 249, 253 (5th Cir. 1991). It is only due to that disconnect between how an indictment is read and how jury instructions are read that the government can even invoke the *Guevara* exception. That simply demonstrates that the exception is predicated on artificial line-drawing between the indictment and the jury instructions.

essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. A finding of insufficient evidence to support the verdict thus implies that the jury in question could not have been acting as a "rational" trier of fact or else was mislead as to what they should have been doing, which are among the risks against which such a rule guards. Where the relevant inquiry is whether a jury could have *rationally* reached the conclusion it did, then the far more relevant touchstone is what the jury was instructed to do, not how it might interpret the indictment.

An extra-statutory element added in an indictment has no greater effect on the jury's deliberations than do the jury instructions adding such an element. Indeed, it has less of an impact. Juries are instructed that the indictment is not evidence and that the jury instructions will guide them. JA 158. Although the indictment is among the first things a jury may hear, the instructions are the last guidance the jury receives and will have the most impact on how counsel for both sides argue the case in closing. Due process concerns that support sufficiency of the evidence review when an element is added to the indictment more forcefully support such review when the element is added to the jury instructions.[9]

---

[9] That courts uniformly apply the law-of-the-case doctrine when an added element is understandably erroneous, though not "plainly" so, likewise contradicts the government's due process analysis. Understandable errors still do not alter the underlying statute or the indictment, yet they are binding even in the First and Fifth Circuits.

D. The Law-of-the-Case Doctrine Plays a Valuable Role in Checking the Government and Serving the Interests of Lenity and Liberty.

Applying the law-of-the-case doctrine without exception in criminal cases when jury instructions add an element is a better rule because it simply holds the government to such burdens as it has assumed when seeking to exercise the weighty power of criminal prosecution. While our Constitution recognizes and seeks to check the tremendous danger involved in the government's power to prosecute and incarcerate its citizens, there are now numerous means by which defendants can forfeit potentially valid claims through procedural default at multiple stages in criminal proceedings. Holding the government to this limited instance of having to comply with additional burdens that it assumed without objection not only tends to maintain the proper balance in the procedural rules, it best comports with the Constitution's repeated concern with checking the government's power to take away a person's liberty. If defendants may be required to avoid and survive a host of procedural hurdles in defending their liberty, surely the government should be required to meet such burdens as it has assumed or acquiesced in when not objecting to a jury instruction setting a higher bar than the statute or indictment. *Cf. Jimenez Recio*, 537 U.S. at 279 (Stevens, J., concurring in part and dissenting in

part) ("The prosecutor, like the defendant, should be required to turn square corners.").[10]

II. A Statute-of-Limitations Bar Not Raised at or Before Trial Is Reviewable on Appeal.

The general federal limitations statute limits the authority of both the Executive and Judicial branches by providing that:

> Except as otherwise expressly provided by law, *no person shall be prosecuted, tried, or punished* for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3282(a) (emphasis added).

On its face, the statute is not merely a procedural requirement for commencing a criminal prosecution, but instead is a substantive *limit* on the government's power to prosecute, try, or punish a person for non-capital offenses if the indictment is untimely.

---

[10] If this Court agrees that the law-of-the-case doctrine applies, it would need to vacate and remand with instructions to consider the sufficiency of the evidence for the "exceeds" element. Given Judge Haynes's concurring view that there was sufficient evidence of exceeding authorized access, based on her taking sides in a fully briefed circuit split regarding the interpretation of that provision, Pet. App. A16; *supra* at 11, this Court could potentially find this case returning for yet another split. Should this Court be so inclined, it might seek supplemental briefing on that issue in order to provide some guidance. *See* Pet. 20-21 n. 5 (noting the contingent issue).

Whether that substantive limit is also a jurisdictional limit that cannot be waived is a subject of debate among the courts of appeals. The more pertinent and encompassing question for this case, however, is whether such limits, jurisdictional or not, can be waived by a defendant *inadvertently*, rather than only knowingly and intentionally, or not at all.

On appeal, Petitioner sought to raise a statute-of-limitations bar to Count 2 that had not been raised at trial. Pet. App. A8-A9. He argued that the acts alleged took place nearly seven years before the Superseding Indictment was filed and that the government could not claim the Superseding Indictment related back to the original Indictment because it had materially altered the charge in Count 2. Accordingly, Count 2 was barred by the applicable five-year limitations period. Brief of Appellant at 48-50; 18 U.S.C. § 3282(a).

The Fifth Circuit declined to reach the merits, holding that "a limitations defense is waived if, as here, it was not raised at trial." App. A8 (citing *Arky*, 938 F.2d at 582). Other courts similarly hold that a limitations defense not raised before or during trial is deemed waived on appeal. *United States v. Franco-Santiago*, 681 F.3d 1, 12 (1st Cir. 2012) (citing, though not following, cases on waiver).

Three courts, however, take a different view. One circuit simply permits the issue to be raised for the first time on appeal absent an "explicit waiver." *United States v. Crossley*, 224 F.3d 847, 858 (6th Cir. 2000) ("absent an explicit waiver, the statute of limitations presents a bar to prosecution that may be raised for the first time on appeal").

Two circuits, the First and Seventh, allow review for plain-error. *Franco-Santiago*, 681 F.3d at 13 ("Because he did not raise his statute of limitations defense at trial, we review for plain error") (citing *Olano*, 507 U.S. at 731-32, and FED. R. CRIM. P. 52(b)); *United States v. Baldwin*, 414 F.3d 791, 795 & n.2 (7th Cir. 2005) ("In this circuit, statute of limitations arguments not timely raised in the district court are considered forfeited, not waived, and are accorded plain-error review."), *overruled on other grounds by United States v. Parker*, 508 F.3d 434 (7th Cir. 2007).

A. The Federal Statute of Limitations Is a Substantive and Jurisdictional Constraint on Government Action.

The federal statute of limitations is an express restraint on the power of the Executive and the courts to prosecute, try, and punish people for certain past acts more than five years after such acts. The statute is no mere administrative tool for keeping dockets moving, but rather imposes a substantive limit on the power of government and a corresponding substantive right "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie v. United States*, 397 U.S. 112, 114-15 (1970); *see also Benes v. United States*, 276 F.2d 99, 108-09 (6th Cir. 1960) ("the purpose of statutes of limitations [in criminal actions] is to afford immunity from punishment * * * and that such statutes are construed, in contradistinction to statutes applicable to civil actions, not as statutes of repose going to the remedy

only, but as creating a bar to the right of prosecution.") (citations omitted).

Various courts over the years have held that not only is the statute of limitations substantive, it is also jurisdictional and thus cannot be waived. In *Benes*, for example, the Sixth Circuit held that "an indictment, found after the expiration of the time for beginning prosecution, is barred by the statute of limitations and is not waived by" agreement or other conduct of the accused. 276 F.2d at 109; *see also Waters v. United States*, 328 F.2d 739, 743 (10th Cir. 1964) (the statute of limitations "is plainly a limitation upon the power to prosecute or to punish. It is, therefore, jurisdictional, and noticeable" when raised for the first time on appeal).

Since those cases, the jurisdictional view of the statute of limitations has fallen out of favor among the circuits. *See Arky*, 938 F.2d at 581-82 (noting rejection of jurisdictional view). Even the early adopters have retreated from the jurisdictional view. *See Crossley*, 224 F.3d at 858 (construing *Benes* narrowly as applying only "absent an explicit waiver"); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987) (holding that the statute of limitations is an affirmative defense that is waived unless raised at trial, without mentioning earlier *Waters* decision)

Despite the broad hostility in the courts of appeals toward the jurisdictional view of statutes of limitations, those courts are mistaken. As with various time limits for noticing a civil appeal or seeking certiorari in this Court, the federal statute of limitations in § 3282(a) is indeed jurisdictional, depriving both prosecutors and the courts of the power to prosecute,

try, and impose punishment pursuant to untimely indictments.

In recent years, this Court has frequently considered whether a time limit or other threshold requirement is a jurisdictional rule or a claims-processing rule. In *Bowles v. Russell*, 551 U.S. 205, 209 (2007), for example, this Court held that "the taking of [a civil] appeal within the prescribed time is 'mandatory and jurisdictional.'") (citation omitted and internal quotation marks omitted). *Bowles* relied upon the wording of the time limit, its imposition by statute, and a history of treating such limits as jurisdictional. 551 U.S. at 209-13; *see also id.* at 213 ("the notion of '"subject-matter"' jurisdiction obviously extends to '"classes of cases * * * falling within a court's adjudicatory authority,"' * * * but it is no less 'jurisdictional' when Congress prohibits federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed") (citations omitted).

Cases since *Bowles* also have emphasized the particular language of the time limit at issue, whether that limit applied to review by Article III courts rather than Article I tribunals, the identity of, and solicitude of the statutory scheme toward, the party against whom the limitation would operate, and cannons of construction bearing upon the construction of the time limit. *See, e.g., Henderson v. Shinseki*, 562 U.S. 428, 437-41 (2011) (noting that the statutory scheme in question is "unusually protective" of the veterans against whom the time bar was asserted; distinguishing cases involving "review by Article III courts" from the time limit for "review by an Article I

tribunal"; noting that the " 'solicitude of Congress for veterans is of long standing' " and applying " 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.' ") (citations omitted).

Under the standards of this line of cases, the limitations period in § 3282(a) amply qualifies as jurisdictional.

First, the language of the statute speaks quite definitively and in terms of forbidding prosecutors and courts from exercising their powers if the timing requirements have not been met, and thus addresses a "court's adjudicatory capacity." *Henderson*, 562 U.S. at 435. Indeed, the limitations provision of § 3282(a), which expressly *forbids* untimely action by prosecutors and the courts is an even stronger case for jurisdictional status than are the time limits for appeals and petitions for certiorari in civil cases, which use somewhat less forceful language. *See* 28 U.S.C. § 2107(a) ("no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree"); 28 U.S.C. § 2101 ("Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree" subject to extension "for a period not exceeding sixty days."); *cf. Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (" 'if a statute does not specify a consequence for noncompliance with statutory timing provisions,

the federal courts will not in the ordinary course impose their own coercive sanction.' ") (citation omitted).[11]

Second, as in *Bowles*, and unlike in *Henderson*, the limitations period applies to proceedings sought to be brought in Article III courts. Indeed, it expressly prohibits the conduct of a trial and imposition of punishment by Article III courts themselves when the prerequisite of timely indictment is not satisfied.

Third, unlike in *Henderson*, a civil case where there was a statutory scheme and a cannon of construction encouraging construction of the relevant provision in favor of the veterans opposing a jurisdictional characterization of the time limits, 562 U.S. at 439-40, here, the applicable background principles and cannons all lean in favor of a *stronger* limitations bar, not a weaker one. *Toussie*, 397 U.S. at 115 (" 'criminal limitations statutes are "to be liberally interpreted in favor of repose," ' "); *Benes*, 276 F.2d at 108-08 (noting broad construction of criminal as opposed to civil statutes of limitations); *Santos*, 553 U.S. at 514-15 (rule of lenity).

In short, the many factors considered in this Court's current jurisprudence on jurisdictional time limits strongly favor treating § 3282(a) as jurisdictional and amply distinguish it from other timing requirements viewed as mere claims-processing rules.

---

[11] That the statute only allows exceptions to its command "as otherwise *expressly* provided by law," § 3282(a) (emphasis added), further negates any suggestion that it can be avoided by implication, judicial doctrines of waiver, or the action or inaction of the accused. None of those involve express provisions of law.

Cases rejecting a jurisdictional view of criminal statutes of limitations have not discussed this line of precedent. Instead, such cases reason that the statute of limitations is an affirmative defense and hence, like other affirmative defenses, is waived if not asserted at trial. *See, e.g., Arky*, 938 F.2d at 581-82 (citing cases).

Such reasoning, however, turns on the predicate that the statute of limitations *is* an affirmative defense rather than a jurisdictional limit, and thus begs the question to some extent. To provide the necessary predicate, therefore, those cases rely on this Court's distant decisions in *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917), and *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872), for the proposition that a limitations bar is an affirmative defense that must be plead by the defendant. *See, e.g., Acevedo-Ramos v. United States*, 961 F.2d 305, 307 (1st Cir. 1992) (quoting *Biddinger* for the proposition that " 'The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases.' "); *see also* BIO at 17 (citing *Biddinger* and *Cook*).

But *Biddinger* and *Cook* are extremely thin reeds upon which to rest such weight.

First, *Biddinger* did not involve the federal statute of limitations, but rather an Illinois statute that was worded quite differently than the statute at issue in this case. That statute provided, in relevant part, that "All indictments for other felonies [including the crimes charged] must be found within three years next after the commission of the crime." 245 U.S. at 131 (bracketed material in original). As a command

for when an indictment must be "found" rather than a prohibition on whether a person can be tried, prosecuted, or punished at all, that statute more readily fits within the more modern view of a claims-processing rule.

Second, *Biddinger* deals only with pleading requirements, rather than issues of waiver and the like.[12] Indeed, the antiquated rationale of the *Biddinger* pleading rule – that the limitations period was not an integral part of the definition of the crime and hence failure to plead compliance is not properly raised on demurrer – has been superseded by FEDERAL RULE OF CRIMINAL PROCEDURE 12(a), eliminating such pleading niceties. *Biddinger* thus has no logical precedence over this Court's modern holdings on when a statute is jurisdictional.

Third, *Cook*, the rather cryptic case on which *Biddinger* itself relied, addresses similarly anachronistic pleading questions regarding the effect of a demurrer. The government itself has recognized that case to be "'an old, abstruse' opinion written in 1872." *Del Percio*, 657 F. Supp. at 858 (noting government's characterization of *Cook*). *Cook*'s primary concern

---

[12] As one judge has noted, *Biddinger* was driven largely by other concerns. *See United States v. Del Percio*, 657 F. Supp. 849, 859 (W.D. Mich. 1987) ("The central issue in *Biddinger* was not the effect of making a federal statute of limitations a non-waivable jurisdictional bar. Rather, the overriding concern was how to interpret Article IV, Section 2 of the Constitution, so as to preserve state sovereignty while ensuring that state constitutions requiring that people be tried in the county or district in which they allegedly committed a crime, not become shields for guilty individuals seeking to immunize themselves by moving from state to state."), *rev'd*, 870 F.2d 1090 (6th Cir. 1989).

was ensuring that prosecutors had an opportunity to respond to a limitations argument by introducing rebuttal evidence or showing a potential exception to a facially applicable limitations bar. *See* 84 U.S. (17 Wall.) at 178-80; *United States v. Harris*, 133 F. Supp. 796, 798-99 (W.D. Mo. 1955) (distinguishing cases finding the statute of limitations to be an affirmative defense as "all rest[ing] on the principle announced in [*Cook*] * * *, that the prosecution must be allowed an opportunity, in meeting the defense of limitations, to show the existence of some exception to the rule").

Furthermore, the reasoning in *Cook* – that the limitations bar was not an integral part of the definition of the offense, 84 U.S. (17 Wall.) at 177-78 – while perhaps relevant to outdated pleading requirements, is squarely incompatible with this Court's recognition that jurisdictional limits need not be contained in the same statutory section at all, much less incorporated into the enacting clause. *See Barnhart*, 537 U.S. at 159 n. 6 ("The accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants").

Ultimately, the sole basis for courts finding the statute of limitations to be waivable – that it is an affirmative defense – thus cannot be supported by the anachronistic cases on which it rests. Far more relevant are this Court's more recent cases distinguishing between jurisdictional rules and claims processing rules; which support a jurisdictional view of § 3282(a).

Finally, even if this Court were ultimately skeptical of a *jurisdictional* characterization of § 3282(a), it

could easily find that the provision is of sufficient importance to the administration of justice that it should be deemed non-waivable as a practical matter. As Justice Thomas observed in *Gonzalez v. United States*, "[i]n limited circumstances, we have 'agreed to correct, at least on direct review, violations of a statutory provision that embodies a strong policy concerning the proper administration of judicial business even though the defect was not raised in a timely manner.'" 553 U.S. at 270 (Thomas, J., dissenting), (quoting *Nguyen* v. *United States*, 539 U.S. 69, 78 (2003) (internal quotation marks omitted)).

This Court in *Nguyen* held that a non-Article III judge sitting by designation on an appellate panel reviewing a criminal conviction violated the federal statute concerning the composition of such panels. 539 U.S. at 80. Even though petitioners raised their objection for the first time in their petitions for certiorari, this Court reviewed the issue not merely for plain error, but *de novo*. *Id.* at 73-74, 80-81. In fact, this court explained that

> to ignore the violation of the designation statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld. Even if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel.

Id. at 80-81 (emphasis in original).

Like the statute at issue in *Nguyen*, which "embodie[d] weighty congressional policy concerning the proper organization of the federal courts," *id.* at 79, the statute of limitations in § 3282(a) embodies weighty congressional policy concerning the checks and limits on the power of the Executive and the courts to prosecute, try and punish crimes. Surely such direct and substantive checks on government power are as weighty as the important, but indirect, checks on power and abuse embodied in the statute at issue in *Nguyen*.

B. Failure to Raise a Limitations Bar Is Not a Knowing and Voluntary Waiver.

Even if the statute of limitations is viewed as non-jurisdictional and potentially waivable, the question then becomes *how* can it be waived? "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733 (1993) (citation omitted).

The mere failure, through inadvertence or neglect, to raise an argument at or before trial is not an intentional relinquishment of a known right. Courts applying the waiver rationale, however, do so even where there is no evidence of intentional or knowing waiver. Indeed, the court of appeals in this case makes no claim that the purported waiver here was knowing and intentional. Pet. App. A8-A9. In such cases the most that can be said is that the argument was forfeited, rather than waived.

This Court has considered issues concerning the *government's* waiver or forfeiture of statute-of-limitations arguments in the context of federal time limits for bringing a habeas petition. *Wood v. Milyard*, -- U.S. --, 132 S. Ct. 1826, 1835 (2012); *Day* v.*McDonough*, 547 U.S. 198, 202 (2006).

In *Wood*, this Court expressly distinguished between forfeiture and waiver and held that if the government merely forfeits, through inadvertence or otherwise, a limitations argument, both the district court and the appellate court may still consider such limitations and dismiss a habeas petition as untimely. -- U.S. at --, 132 S. Ct. at 1830 ("Our precedent establishes that a court may consider a statute of limitations or other threshold bar the State failed to raise in answering a habeas petition."). Noting that the State's "decision not to contest the timeliness of Wood's petition" was a knowing, deliberate and intentional choice, the court held it had waived the limitations issue and hence that issue could not be considered thereafter. *Id.* at , 132 S. Ct. at 1834-35 But this Court expressly distinguished its decision in *Day*, where the failure to raise a limitations issue resulted from "from an 'inadvertent error,'" and thus was reviewable despite forfeiture. *Id.* at --, 132 S. Ct. at 1835 (quoting *Day*, 547 U.S. at 211); *see also id.* at --, 132 S. Ct. at 1832 n. 4 ("We note here the distinction between defenses that are 'waived' and those that are 'forfeited.' * * * "That distinction is key to our decision in Wood's case.").

Although *Wood* and *Day* both involved habeas petitions, they necessarily control the issue here as well. On virtually every possible measure, this

Court's reasoning for a allowing review of a limitations argument merely forfeited, rather than intentionally waived, is *stronger* as applied to the criminal statute of limitations in § 3282(a) than it is for the habeas statute of limitations.

First, a habeas proceeding is civil rather than criminal, and hence limitations periods are viewed as going only to remedy rather than as enacting a substantive bar. *Benes*, 276 F.2d at 108-09.

Second, the language of the habeas statute of limitations at issue in *Wood* is far less definitive as a bar than is the language of the criminal statute of limitations. *Compare* 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."), *with* 18 U.S.C. § 3282(a) ("no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed").

Third, the procedural rules for opposing habeas petitions *require* the government to raise a limitations argument as an affirmative defense in its answer. -- U.S. at --, 132 S. Ct. at 1832; HABEAS CORPUS R. 5(b) ("The answer must * * * state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations."). There is no such requirement for criminal defendants asserting a limitations bar. *See* FED. R. CRIM. P. 12(b)(1) & (3) (motions which "may" and "must" be made before trial, with the statute of limitations not listed among the latter

category, but fitting within the general description of the former category); FED. R. CRIM. P. 12, Notes of Advisory Comm., *Note to Subdivision (b)(1) and (2)* ("defenses and objections which at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver * * * include such matters as * * * statute of limitations").

Fourth, in criminal cases, considerations of liberty and lenity routinely provide defendants with greater leeway and impose more stringent burdens on the government. *Santos*, 553 U.S. at 514-15; *Smith*, 360 U.S. at 9. If the government thus can reap the benefit of a forfeiture rule to raise a limitations claim *against* a prisoner seeking habeas relief, then surely a defendant in a criminal case has at least as much claim to a similar rule.

Fifth, just as limitations periods in the habeas context involve interests broader than those of the immediate litigants themselves, -- U.S. at --, 132 S. Ct. at 1833, criminal limitations periods likewise involve such broader interests. *Toussie*, 397 U.S. at 114-15. Indeed, such interests seem meaningfully weightier for criminal limitations periods and certainly have a longer historical pedigree. *Wood*, -- U.S. at --, 132 S. Ct. at 1835 (Thomas, J., concurring in the judgment) ("Prior to the enactment of a habeas statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), habeas practice included no limitations period at all").

Under *Wood*, therefore, mere oversight does not waive a limitations bar; at a minimum something more is required. *Boykin* v. *Alabama*, 395 U.S. 238,

243 (1969) (an effective waiver of constitutional rights cannot be inferred from a silent record).

Because waiver must be an "intentional" act, rather than a mere oversight, it raises related questions regarding the nature and source of the waiver. "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Olano*, 507 U.S. at 733.

In this case, the limitations period in § 3282(a) represents an important right that should only be waivable with the express and knowing consent of the defendant. This Court has noted the distinction between " 'basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client,' " and decisions on " 'manag[ing] the conduct of the trial' " that the attorney may make without direct participation of the client. *Gonzalez v. United States*, 553 U.S. 242, 248 (2008) (quoting *Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988)).

Whether to raise or abandon the statute of limitations as a potential bar to prosecution, trial, and punishment, seems to fall easily into the category of a decision requiring informed client consent. The choice does not implicate the day-to-day conduct of a trial, the management of time and scheduling, or decisions made in the heat of litigation where there is no reasonable opportunity for constant explanations to, and potential second-guessing by, the client. There thus is no concern, as in *Gonzalez*, that requiring informed client consent to any waiver would interfere with

"tactical considerations of the moment and the larger strategic plan for the trial," would be "difficult to explain to a layperson," or "could risk compromising the efficiencies and fairness that the trial process is designed to promote." *Gonzalez*, 553 U.S. at 249.

Instead, because waiving the right to assert the statute of limitations risks losing a complete bar to prosecution, trial, and punishment, it is closer in nature to more fundamental and "basic trial choices [that] are so important that an attorney must seek the client's consent in order to waive the right." *Id.* at 250-51 (giving as examples the choices to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal); *see also Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) ("[C]ertain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate.").

Indeed, that the failure to raise a limitations issue is so often viewed as ineffective assistance of counsel – falling below the standard of reasonable behavior even apart from determining whether there was prejudice, *see infra* at 56-57 – simply confirms that waiving a limitations bar is a decision of sufficient magnitude and importance that it ought to be done only with the informed consent of the client.

C. At a Minimum, Plain Error Review Is Available for Forfeited Statute of Limitations Bars.

Whatever the nature and characterization of failing to raise a limitations defense, at minimum de-

fendants should still be able to seek review under Rule 52(b) for plain error. That rule provides that

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

FED. R. CRIM. P. 52(b). Merely characterizing an error or defect as inadvertently "waived" is insufficient to preclude the Rule's application.

Under Rule 52(b), a plain error "affecting substantial rights" is one that " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' * * *. An error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Olano*, 507 U.S. at 736-37 (citations omitted).

Limitations defenses, if not viewed as jurisdictional or otherwise reviewable *de novo*, are readily amenable to plain-error review, as a prosecution outside the limitations period calls into question the fairness and integrity of the process. *Franco-Santiago*, 681 F.3d at 14 ("it is in the interests of fairness and integrity that the prosecution be held to the rules governing its own conduct, including in a situation such as this. ' "Every statute of limitations, of course, may permit a rogue to escape," but when a court concludes that the statute does bar a given prosecution, it must give effect to the clear expression of congressional will that in such a case "no person shall be prosecuted, tried, or punished." ' ") (citations omitted). Particularly here, where it was the government's choice to file superseding indictments that triggered the limitations issue, some review is appropriate. *Id.* ("The government's own conduct has brought about this re-

sult, calling into question the integrity and fairness of the process.").

The error in this case also qualifies as plain because the superseding indictments are facially untimely. Whether and how the government might seek to excuse that lateness does nothing to change the initial plainness of the defect. It is the government's burden to argue and prove that the superseding indictments relate back, not Petitioner's burden to preempt such an anticipated response.

D. Structural and Judicial Policy Considerations Favor Allowing Direct Appellate Review of Forfeited Statute of Limitations Bars.

In addition to being the legally correct answer, allowing some form of review of previously unraised limitations bars on direct appeal also is the better answer.

First, the function of the statute of limitations is to provide a check on the government and an eventual immunity for defendants facing the uncertain prospect of federal prosecution. *See Del Percio*, 657 F. Supp. at, 859-860 ("A rule that the running of the statute of limitations cannot be waived in the criminal setting serves a number of important policy functions. Prime among these is restraint of governmental powers."). Prosecutions brought outside the limitations period injure not only the defendant, but the public as well, by rendering uncertain a check imposed by Congress on the government's exercise of its power to threaten and take citizens' liberty. *Id.* ("While statutes of limitations are generally thought

of as protecting individuals * * *, they also serve to restrain the power of the sovereign to act against an accused. * * * The jurisdictional view of the statute of limitations * * * ensures that these two functions do not merge. Under the jurisdictional approach, the statute of limitations exerts an independent force on the government.").

The prospect that the limitations period may be waived simply encourages the government to file claims outside the limitations period in the hopes that the argument will be waived by overworked defense counsel or that the mere threat of conviction might induce a plea before a potential limitations defense is fully explored. It is the public good that is injured by such incentives for aggressive government prosecution beyond the checks Congress has imposed.

Particularly in circumstances like in this case, requiring the government to justify its ever-evolving indictments against limitations claims provides a check against government circumvention of the limitations period and against many of the concerns that justify limitations periods and the prohibition of double jeopardy. Such interests are best served by ensuring the government's compliance with the clear prohibitions of § 3282(a), notwithstanding any error or neglect on the part of a defendant or his counsel.

Second, allowing at least some form of review of overlooked limitations bars also serves the interests of efficient judicial administration. Failure to raise a limitations defense is a common source of complaints that trial counsel was ineffective. *See, e.g., United States v. Coutentos*, 651 F.3d 809, 818 (8th Cir. 2011) (sustaining an ineffective assistance of counsel claim

and vacating conviction where counsel failed to timely raise a statute-of-limitations issue); *United States v. Acevedo*, 229 F.3d 350, 353 (2d Cir. 2000) (Sotomayor, J.) (addressing an ineffective assistance of counsel claim predicated on failure to raise a statute-of-limitations claim at trial, but finding that indictment was timely); *United States v. Diehl*, 775 F.3d 714, 719-21 (5th Cir. 2015) (same); *United States v. Aburahmah*, 34 F.3d 1074 (9th Cir. 1994) (unpubl.) (refusing to consider limitations issue not raised at trial, declining to consider ineffective assistance claim in the first instance, and noting that such claim is reserved for habeas proceedings). Allowing direct review of a limitations defense not raised at trial would mitigate the need for subsequent petitions on that issue by resolving more limitations questions on direct appeal and hence providing a more immediate remedy to any claimed ineffective assistance.

As Justice Scalia has noted in a somewhat related context, even where client consent to the waiver of a right is not required by the Constitution or the Federal Rules, "it is certainly prudent, to forestall later challenges to counsel's conduct, for a trial court to satisfy itself of the defendant's personal consent to certain actions, such as entry of a guilty plea or waiver of jury trial, for which objective norms require an attorney to seek his client's authorization." *Gonzalez*, 553 U.S. at 258 (Scalia, J., concurring in the judgment). It would be equally "prudent" for appellate courts to consider forfeited limitations claims and likewise "forestall later challenges to counsel's conduct."

CONCLUSION

For the reasons above, this Court should reverse the decision of the court of appeals and remand for further proceedings.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

JOE KENDALL
JODY RUDMAN
THE KENDALL LAW GROUP
3232 McKinney Avenue
Dallas, TX 75204
(214) 744-3000

Counsel for Petitioner

Dated: August 28, 2015